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Supreme Court, U.S.
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No. 00-46

IN THE

Supreme Court of the United States

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The federal common-law rule invoked by respondent shares little with the original *D'Oench* decision beyond its name: not only are the rights of the United States not implicated, but the basic equitable principles underlying *D'Oench* are either absent from or actively subverted by the rule invoked here. Federal statutes have thoroughly addressed any federal interests driving the original *D'Oench* case, and the application of state law in this case poses no significant conflict with any federal interest sufficient to support extra-statutory federal rules of decision.

SUMMARY OF ARGUMENT

The validity *vel non* of respondent's asserted common-law rule is a prior and independent requirement that respondent cannot meet. The various asserted interests in speedy evaluation of failed banks, avoiding circumvention of asset recoveries, and deterring unrecorded agreements may be served by *statutory* defenses enacted by Congress and not questioned here, but those interests do not support extension of a common-law rule beyond the statute to this case, and in many respects such extension would actually undermine those interests. The valid scope of any common-law rule entirely depends on a conflict with federal interests, and with no such conflict, there is no valid rule.

The passage of FIRREA, and the 1950 Act before it, both eliminated the need for federal common law and spoke directly to the questions supposedly addressed by federal common law, thus creating an exclusive negative inference regardless of whether the common law at issue is old or new. Furthermore, there is no question that the particular rule sought by respondent did not pre-exist FIRREA. The attempt to shift to a presumption preserving an abstract and mutable principle not yet applied as a concrete rule is not supported by the cases and would contradict this Court's restrictive view of

conflict-based federal common law. Indeed, that variety of common law is so questionable to begin with that it should not benefit from any preserving presumption. Finally, even if a presumption in favor of existing common law were applied, FIRREA and the 1950 Act spoke directly to the relevant questions and hence overcome that presumption.

ARGUMENT

I. No Valid Federal Common Law Is Applicable to this Case.

A. *O'Melveny* and *Atherton* Both Apply.

Though disputing the applicability of the field-preemption analysis of *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), respondent does not dispute the holding of both *O'Melveny* and *Atherton* v. *FDIC*, 519 U.S. 213 (1997), that the validity of federal common law must be established independently of any issue of statutory displacement. As in *Atherton*, that requirement applies with full force regardless of whether the lower courts have been erroneously applying the relevant common-law rule for decades.

Nor does respondent dispute the limitations established in *O'Melveny* and *Atherton* regarding the availability and validity of federal common-law rules for the benefit of the FDIC-Receiver: the FDIC-Receiver "is not the United States"; it is required to establish a rare "'significant conflict'" between state law and federal policy; and "[n]ot only the permissibility but also *the scope* of judicial displacement of state rules turns upon such a conflict." *O'Melveny*, 512 U.S. at 85, 87-88 (emphasis added) (citation omitted).

As for *O'Melveny*'s field-preemption analysis, respondent only claims that it does not apply to supposedly pre-existing and well-established federal common law, defending the Eleventh Circuit's reliance on *United States* v. *Texas*, 507 U.S. 529 (1993). Importantly, aside from that attempt at avoiding *O'Melveny*, respondent does not even attempt to

suggest that his extraordinarily expansive version of the *D'Oench* doctrine would survive *O'Melveny*'s displacement analysis. As discussed below, the *Texas* approach does not apply to this case, and hence *O'Melveny* mandates reversal.

B. The *D'Oench* Doctrine Is Independently Invalid as Applied to this Case.

Even when the FDIC-Receiver was a party to this case, it asserted only private interests, not those of the United States. *Atherton*, 519 U.S. at 225; *O'Melveny*, 512 U.S. at 85. And prior to the district court's *sua sponte* ruling on the unbriefed *D'Oench* issue, the FDIC-Receiver had left the scene entirely, and the remaining assets of the bank had been returned to the agent *for the shareholders*. Whereas the FDIC-Receiver once merely stood in the Bank's shoes, those shoes were returned to their original owners and are now occupied by respondent.[1]

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[1] Respondent deems this mere happenstance, and the Solicitor General claims the issue was not raised below. Resp. Br. 14 n.11, 49; U.S. Br. 7, 27. Neither is correct. The substitution of respondent was the expected and required result of the receivership completing its task with a surplus. Respondent is a successor not through purchase or the like, but solely as an agent of the shareholders appointed to take receipt of the excess from the receivership. 12 U.S.C. § 197. That is no happenstance. Petitioner objected to application of *D'Oench* for the benefit of such a successor and argued that barring his claim ran contrary to the purposes underlying the original *D'Oench* decision. Br. of Appellant (CA11), at 20; Reply Br. (CA11), at 8, 13-15. Similarly, petitioner argued before the Eleventh Circuit that both *O'Melveny* and *Atherton* barred application of the *D'Oench* doctrine. Br. of Appellant (CA11), at 20. Those cases addressed the basic validity of federal common law for the benefit of the FDIC-Receiver, not merely issues of statutory displacement, and their invocation below is more than adequate to preserve an argument that respondent's rule is unsupported by any conflict with federal interests or policies. Finally, discussions of whether the details of respondent's rule comport with the *D'Oench* decision or had even evolved prior to 1989 are appropriate responses to the Eleventh Circuit's reliance on *Texas*, and in any event are squarely encompassed within the Question Presented and the discussion in the Petition. And they constitute prior issues properly addressed regardless of whether they were raised below. See *Lebron* v. *National R.R. Pas-*

Despite the private interests served by both respondent and his predecessor the FDIC-Receiver, respondent and the Solicitor General nonetheless assert several putative federal interests in support of an extended *D'Oench* doctrine: (1) allowing reliance on the speedy evaluation of a failed bank when making the decision to liquidate or to use a purchase and assumption ("P&A") transaction, Resp. Br. 4, 12-13; U.S. Br. 2; (2) avoiding circumvention of the primary rule applicable to asset collection by barring affirmative claims, Resp. Br. 4, 12-13, 45-46; (3) deterring use of unrecorded agreements and promoting proper lending practice, U.S. Br. 2, 9; (4) protecting creditors, depositors, and the FDIC from absorbing losses, U.S. Br. 2; and (5) promoting prompt and cost-effective resolution of litigation, *id.* at 2, 9. But such supposed interests are fully served by statute and cannot support the extra-statutory *scope* of the federal common-law rule respondent seeks.[2]

Reliance on Rapid Evaluations of Failed Banks. The rapid evaluation/reliance interest is only implicated if and when the FDIC-Corporate chooses a P&A transaction instead of a liquidation. In such a case, the FDIC-Corporate may indeed rely on its favorable § 1823(e)-enhanced assessment of the bank's condition when deciding to make payments from the insurance fund in exchange for bank assets. Cf. Resp. Br. 12-13 (acknowledging connection between policy interest and P&A transactions, citing *Gunter* v. *Hutchinson*, 674 F.2d 862 (CA11), *cert. denied*, 459 U.S. 826 (1982)). The economics of the P&A decision could well be undermined if unrecorded

senger Corp., 513 U.S. 374, 379 (1995); *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980).

[2] The FDIC's assertions regarding the need for expansive application of *D'Oench* have also been the subject of criticism generally. *E.g.*, *Hearing of S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 93-106 (1995) (prepared testimony of Prof. Peter P. Swire).

agreements subsequently blocked collection on the assets taken by the FDIC-Corporate.

But where even the enhanced valuation of a failed bank is still so unfavorable as to trigger liquidation instead of a P&A transaction, there is no conceivable reliance on the value-*inflating* qualities of the *D'Oench* doctrine or even the statute. If the bank later proves worse off than originally thought, that only *corroborates* the choice to liquidate and undermines nothing. This alleged interest simply does not apply in the liquidation context.

That the *statutory* defense nonetheless extends to the FDIC-Receiver does not rebut the lack of a federal interest. Respondent offers no explanation of the policy behind such statutory extension, Resp. Br. 44, none is particularly evident, and Congress is free to act for reasons trivial or mistaken. The mere existence of a limited statutory defense for FDIC-Receiver, inapplicable to this case, does not demonstrate the "high federal interest" required for federal common law. *O'Melveny*, 512 U.S. at 86; see *Atherton*, 519 U.S. at 218.[3]

Respondent's observation that *D'Oench* itself cited state-law equitable defenses available to state receivers and banks, Resp. Br. 44, does not show that it intended to create *federal* law governing receivers and private parties as well as the FDIC-Corporate. Rather, *D'Oench* took that state-law rule as the touchstone for its own rule applicable to the rights of the United States, leaving state law to address the rights of other parties, including receivers. See *D'Oench, Duhme & Co.*,

[3] Respondent's claim that "no court of appeals has ever accepted the distinction" between FDIC-Corporate and FDIC-Receiver, Resp. Br. 44, is disproved by his own citations to *Ledo Financial Corp.* v. *Summers*, 122 F.3d 825, 829 & n.2 (CA9 1997), and *Gunter* v. *Hutchinson*, 674 F.2d 862, 873 n.15 (CA11), *cert. denied*, 459 U.S. 826 (1982), making precisely such a distinction, Resp. Br. 33 n.18, 45-46 n.26. Any contrary and ill-considered views in other lower-court cases hardly undermine a material distinction that this Court itself has twice relied upon in similar circumstances. See *O'Melveny*, 512 U.S. at 85; *Atherton*, 519 U.S. at 225.

Inc. v. *FDIC*, 315 U.S. 447, 457-59 (1942). And that is how the case has been understood over time – as having developed federal common law because the rights of the United States were involved. See *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 519 (1988) (citing *D'Oench* as an example of federal common law governing the "obligations to and rights of the United States under its contracts"). The claim that *D'Oench* meant to federalize all of the state law it cited, even as to situations *not* involving the rights of the United States, has no support in the case and could not be reconciled with subsequent cases limiting federal common law.

No Circumvention Through Affirmative Claims. Respondent incorrectly asserts that failure to extend the *D'Oench* doctrine to affirmative claims would "swallow the rule" as applied to asset collections by allowing a borrower to "recoup the monies sought by the FDIC simply by bringing an unbarred counterclaim based upon a secret agreement." Resp. Br. 45. Whatever the merit of this concern in the FDIC-Corporate context, it makes absolutely no sense in the receivership context because a successful claim against a receivership would not automatically offset even a related collection effort.[4] Rather, recognizing a valid claim in this context only generates the right to stand in line along with other recognized claimants and await potential payment according to the applicable payment priorities. Receivership expenses, depositor liabilities, and any reimbursement to the FDIC-Corporate all take priority over general liability claims such as in this case. 12 U.S.C. §§ 1821(d)(11)(A), 1821(g). With direct statutory protection against defenses to asset collection itself, the prioritization of recovery for affirmative claims eliminates any purported conflict with federal interests. Indeed, the only consequence of disallowing petitioner's claim

[4] The circumvention rationale is even more preposterous as applied to "no-asset" claims such as in this case because there is no attempted asset recovery to be circumvented.

entirely will be to enhance the recovery of the bank's shareholders at the expense of a *victim* of the bank's secret agreement, a result entirely at odds with the equitable and policy concerns underlying the original *D'Oench* decision.

No Federal Policy Requiring Maximum Deterrence of Unrecorded Agreements. While the original *D'Oench* decision may have somewhat discouraged unrecorded agreements, that does not establish a significant federal interest in *maximizing* the deterrence of such agreements by continually expanding the doctrine beyond the scope of what Congress has seen fit to enact after repeated consideration. As this Court recognized in *Miree* v. *DeKalb County*, 433 U.S. 25, 32 (1977), the fact that a rule "might be thought to advance federal * * * policy by inducing compliance with" federal regulations is insufficient to justify adoption of such rule as federal common law where only the rights of private parties, not the rights of the United States, are at issue. See also *O'Melveny*, 512 U.S. at 89 (rejecting claim that state rule would "disserve the federal program").

Furthermore, the alleged deterrence interest is not served in cases such as this, where petitioner was not a customer of the bank and had no involvement in or responsibility for making the agreement. See Pet. App. C6 (noting absurdity of applying recording requirements to bar claims by third parties such as Murphy). To bar Murphy's claim against the Bank would not deter such secret agreements, it would *reward* them by permitting them to form the basis of a fraud for which the victim cannot recover. The claimed deterrence interest thus does not support extending the "scope" of federal common law to the type of claims at issue in this case.

Protection of Depositors, Creditors, and the FDIC-Receiver. As noted above, neither depositors nor the FDIC-Receiver face any risk from application of state law to allow the type of affirmative claims in this case. Those claims have lower priority than claims by depositors of the FDIC-Receiver itself. And as for protecting creditors, Murphy is also an in-

nocent potential judgment creditor, and there is absolutely no federal interest in balancing the private rights of one creditor against another in a manner different from state law. Adjusting such wholly private rights is the province of state law. See *O'Melveny*, 512 U.S. at 84.

Litigation Ease. The assertion that the FDIC-Receiver's litigation success and ease is the type of federal interest sufficient to underpin federal common law is both unsupported and incredible. As this Court noted in *O'Melveny*, there is no federal interest in seeing that the FDIC-Receiver wins more frequently, much less in helping it avoid the ordinary consequences of litigation. 512 U.S. at 88.[5]

What is most telling about the various interests alleged to justify the common-law rule invoked in this case is how little they have to do with the federal interest actually articulated in *D'Oench* itself: a "federal policy to protect [FDIC-Corporate] and the public funds which it administers against misrepre-

[5] In response to the contradiction between the assertion of federal interests in the *D'Oench* doctrine and FDIC-Receiver's policy to eschew all reliance on such common law in pre-FIRREA cases, Pet. Br. 20, the Solicitor General responds with the non-sequitur that FDIC's policy statement has no bearing on Congress' intent when enacting FIRREA. U.S. Br. 22 n.10. But the FDIC-Receiver's abandonment of the common-law *D'Oench* doctrine, including, presumably, the inchoate and evolving *D'Oench* "principle" in favor of the statutory defenses, forcefully demonstrates the absence of a conflict with a significant federal interest beyond the confines of the statute. Indeed, the government repeatedly touted the irrelevance of the common-law doctrine in Briefs in Opposition to this Court when trying to avoid review. See Pet. Br. 20 (citing FDIC's prior oppositions). If the *D'Oench* doctrine remains as valuable as the Solicitor General now conveniently claims, the FDIC-Receiver would be confessing its own malfeasance in abandoning such an important defense and in misleading the Court as to its continuing importance. Petitioner prefers to think the FDIC-receiver was half right in the first place: the common-law *D'Oench* doctrine serves no significant federal interests, particularly after FIRREA, and its continuing importance as far as this Court is concerned arises from the failure of private successors to abandon the defense as the FDIC-Receiver claims to have done.

sentations as to the securities or other assets in the portfolios of the banks which [FDIC-Corporate] insures or to which it makes loans." 315 U.S. at 457. That policy has no application to the FDIC-Receiver, to successor agents for the shareholders, or to no-asset affirmative claims. Accordingly, there is no legitimate basis for applying the expanded federal common-law rule sought by respondent. Respondent's ultimate notion that *D'Oench* is needed "as a 'safety net' to ensure that the beneficial purposes of the FIRREA statutes are fully realized," Resp. Br. 49, is no different than the FDIC's earlier claim that state law would "'disserve the federal program,'" which this Court found to be a "facile approach to federal-common-law-making." *O'Melveny*, 512 U.S. at 89.

C. FIRREA Preempts the Field for Federal Common Law Defenses in Connection with Receiverships.

Aside from his purported creation/abrogation dichotomy as a means of avoiding *O'Melveny*'s field-preemption and *inclusio unius* analysis, respondent essentially concedes that if the relevant common law did not exist prior to FIRREA, its creation post-FIRREA is forbidden. And even assuming that respondent's common-law defense here pre-existed FIRREA, that would not eliminate the *inclusio unius* inference; it would merely pit it against a competing presumption of preservation. Petitioner's initial discussion of *O'Melveny* and *Langley* v. *FDIC*, 484 U.S. 86 (1987), demonstrates that the exclusivity inference is extremely strong, and that the preservationist presumption is weak given the nature of the common-law rule asserted in this case. Pet. Br. 18-20 & n.7. That *inclusio unius* inference is sufficient to overcome even the *Texas* presumption. See *infra*, Part II(D).

II. THERE IS NO BASIS FOR AVOIDING THE RULE OF *O'MELVENY* AND *ATHERTON*.

Respondent's attempt to avoid *O'Melveny* and *Atherton* turns primarily on the claim that those decisions deal only with creation of *new* rules whereas *United States* v. *Texas*

provides a distinct and exclusive analytical framework for old common-law rules. But respondent fails to justify application of the *Texas* approach to the very different circumstances of this case.

A. Invalid Federal Common Law Is Not Presumed Retained, Regardless of Its Age.

Respondent does not dispute that if the federal common-law rule at issue is invalid on its own merits it is not preserved by subsequent congressional action. The *Texas* principle assumes neutrality, not approval, and will not save prior common law the defect of which is subsequently revealed. That was the case in *Atherton*, where erroneous lower court application of the *Briggs* rule was not validated by FIRREA. Likewise, if respondent's proposed rule fails the primary validity analyses from *O'Melveny* and *Atherton*, there is nothing in *Texas* that would save the rule and the displacement/preservation issue becomes irrelevant.

B. *O'Melveny* and *Atherton* Both Apply to Pre-Existing Federal Common Law.

Citing the occasional reference to the "creation" of federal rules of decision, respondent claims that the analytical tools in *O'Melveny* and *Atherton* do not apply to pre-existing federal common law. Resp. Br. 22, 23, 29-31. But neither case suggested that a different analysis would apply when scrutinizing previously created federal common law, and both in fact cited a variety of such cases as part of their reasoning. That *Atherton* was not limiting its discussion to novel acts of creation can be seen by its consideration of "whether relevant federal common-law standards could have survived *Erie*." 519 U.S. at 218. The issue was not whether to create a new rule, but whether an old rule remained viable after the rejection of an underlying predicate. Given that the lower courts and federal agencies had continued to apply the rule for decades after *Erie* and prior to FIRREA, that rule was far better established from Congress' perspective at the time of FIRREA's enactment than were the then-non-existent mutations of the *D'Oench* doctrine upon which respondent relies here.

And in *O'Melveny*, while the Court may have viewed the specific requested rule as new, the FDIC-Receiver in that case made the same claim it makes here: that the particular rule was merely an application of a more general federal common-law "principle." Brief for the FDIC, *O'Melveny & Myers* v. *FDIC*, No. 93-489, at 41 (Feb. 18, 1994). In fact, it claimed that the applicable federal principle derived from the *D'Oench* doctrine itself and that "Congress did not intend to overrule that principle when it enacted FIRREA." *Id.* While the particular rule sought in *O'Melveny* thus may have been new, the government's reliance on an allegedly pre-existing "principle" raised exactly the same analytical issue that respondent raises here.

Respondent cites to *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), for a supposed "distinction between the *creation* and the *abrogation* of federal common law." Resp. Br. at 35 (emphasis in original). But the *Milwaukee* passage quoted by respondent speaks of the use of federal common law under a variety of circumstances, and does not suggest that the initial decision to create common law is significantly different from the subsequent analysis of whether such law remains viable. See 451 U.S. at 313-14 (noting that federal common law is created only as a "necessary expedient" in the "absence of an applicable Act of Congress," and that once "Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears"). Rather than distinguishing creation and retention, *Milwaukee* equates them and holds that where the "need" that would justify initial creation of common law ceases to exist because a federal statute is available, the justification for continuation of an earlier rule would likewise disappear. The proper test, therefore, is that if a rule could not be justified as new common law, it cannot be retained as an old common law.

Furthermore, *Milwaukee*'s caution against supplementation that makes a statute "meaningless," 451 U.S. at 315, applies to both new and old common law and is particularly relevant to respondent's sweeping vision of the *D'Oench* doctrine. If the *D'Oench* doctrine represents an encompassing principle rather than specific rules, it would render the provisions of FIRREA entirely meaningless. There is nothing covered by the statute that would not be covered by the overstated *D'Oench* doctrine, and there is no defense eliminated by the statute that would not be covered by the common law. But there is no reasonable explanation for why, as respondent asserts, Congress would have *partially* codified the *D'Oench* doctrine in this fashion.[6]

C. The *Texas* Approach Does Not Apply to the Common-Law Rules Asserted in this Case.

Regardless of whether the *Texas* approach is in fact distinct and more forgiving than the *O'Melveny* analysis, it does not properly apply in this case because the relevant common-law rules were not well-established when FIRREA was passed, extension of *D'Oench* to this case would not involve core federal common law, and any such presumption would clash with the greater presumption in favor of retaining state rules of decision. Any favorable *Texas* presumption should be limited to the far more compelling circumstances present in that case, where the elimination of a core federal common-law rule governing the rights of the United States itself would have led to absurd results.[7]

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[6] Respondent relies upon *Astoria Federal Savings & Loan Association* v. *Solimino*, 501 U.S. 104, 108 (1991), for a presumption of common-law retention. Resp. Br. 37. But *Astoria* notes that the presumption in favor of a more policy-based common law rule does not demand a "clear statement" in order to be overcome, and can be defeated by implication from other aspects of a statute. 501 U.S. at 108-10.

[7] *Texas* also is easily distinguishable because the statute in that case addressed the federal government's right to secure interest from private parties rather than states, which were not included within the definition of "person." Nothing in FIRREA's comprehensive scheme of regulation, by contrast, indicates that Congress left a particular application of the *D'Oench* doctrine to be addressed through common law.

Absence of Pre-FIRREA Common Law Applicable to this Case. Respondent cannot deny that the federal common law *rule* as invoked in this case was not established in 1989 when FIRREA was passed. Compare Pet. Br. 26-28 (pre-FIRREA cases mixed on applicability to FDIC-Receiver and non-existent on affirmative claims or successors) with Resp. Br. 13-14 (citing mostly *post*-FIRREA cases on FDIC-Receiver and successors, never denying that the few pre-FIRREA cases were mixed).[8] Respondent's own citations demonstrate that a major aspect of its asserted rule was affirmatively rejected by some courts prior to FIRREA. Resp. Br. 45-46 n.26 (citing pre-FIRREA case limiting *D'Oench* to FDIC-Corporate and noting its rejection only in a post-FIRREA decision). And, of course, the true test of the existence of a federal common-law rule – recognition by this Court – has never occurred for the specific rule invoked by respondent. The vastly different and narrower *D'Oench* decision simply does not suffice.

Unable to defend the specifics of his rule, respondent instead claims that it is the "policy underlying" the *D'Oench* decision that was preserved by the *Texas* presumption and thus remains available to "'adapt[] itself to varying conditions.'" Resp. Br. 47 (quoting *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953)). *Lutwak*, however, involved an express

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[8] The federal *amici*'s citation to several pre-FIRREA cases finding *D'Oench* applicable to FDIC-Receiver conveniently ignores the *other* cases from the same period finding precisely the opposite. U.S. Br. 12-13 (selective reference to cases). Furthermore, many of the cases cited therein merely applied the doctrine to the FDIC-Receiver without discussing whether such application was proper. Courts that actually considered the issue pre-FIRREA reached differing results. Pet. Br. 26-27. Conflicting lower court decisions provide nothing on which to hang the *Texas* presumption.

delegation of authority to the courts to interpret and develop common-law rules of evidence. 344 U.S. at 614. That is far different from the highly restricted variety of federal common law at issue here, which is at best available if, and only to the extent that, a conflict with federal policy exists. Such common law is neither mutable nor flexible, but rather highly constrained by the conflicts which justify its existence.

The notion that the *Texas* presumption applies not to specific rules but rather to sweeping policies has never been accepted by this Court and is fully inconsistent with any number of cases, including *O'Melveny*. Indeed, in *O'Melveny* the FDIC-Receiver unsuccessfully made the virtually identical argument that the longstanding "principle" of *D'Oench* formed the basis for the particular rule it was seeking. FDIC Br. in *O'Melveny*, at 41; see also *id.* at 31, 34.[9]

In petitioner's view, the proper level of generality when analyzing supposedly pre-existing common law is at the level of a particular and well-established rule. Any presumption saving open-ended "principles" that could animate new common-law *rules* would in effect eliminate the *O'Melveny* analysis even if that case were viewed as limited to new rules.

Respondent's claim that this Court has recognized *D'Oench* as a "valid declaration of common-law principles," Resp. Br. 10, ignores the nature of the "principle" so recognized. See *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947) (citing *D'Oench* as example involving the rights of the United States); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 101 (1945) (merely citing *D'Oench* as an example of a claim based on federal law, without elaboration). This Court in *Langley* did not acknowledge any continuing common-law

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[9] The FDIC-Receiver's prior position creates a dilemma: either *O'Melveny* dealt with a pre-existing "principle" and hence is on all fours with respondent's view of this case, or the proper focus is not on the principle, but on the particular *rule*, in which event this case involves the post-FIRREA "creation" of a rule just as much as did *O'Melveny*.

validity to *D'Oench* at all, but rather used it as a tool of statutory construction and effectively rejected the notion of extra-statutory federal rules. See 484 U.S. at 95. And in *Boyle* v. *United Technologies*, a case cited by *amici*, U.S. Br. 13, 22 n.9, *D'Oench* was given as an example of federal common law governing the "obligations to and rights of the United States under its contracts." 487 U.S. at 519. Insofar as this Court recognized a "principle" from *D'Oench*, it is a principle that does not apply to this case.[10]

Suspect Category of Federal Common Law. Regardless of whether the *Texas* approach applies to preservation of core federal common law, it should not apply here given that this case involves the much disfavored category of conflict-based judicial policymaking. Any such judicial lawmaking raises constitutional doubts distinct from other types of federal common lawmaking, uniquely burdens state law, and undermines the much stronger presumption favoring preservation of those rules. Pet. Br. 18 n.7, 24-26. And because the particular rule has never previously been recognized by *this* Court, there is even greater reason to withhold any presumption favoring continuance of the rule. Indeed, respondent cites not a single case where the presumption was applied to a rule not specifically recognized by this Court.

Respondent claims that denying the *Texas* presumption to federal common law that displaces *state* common law would

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[10] Quoting a redacted line from the oral argument in *O'Melveny*, respondent claims that a member of this Court observed that "FIRREA 'was legislated against a background of federal common law,' which included *D'Oench*." Resp. Br. 22 n.16. But the unredacted comment at oral argument demonstrates the precise opposite sentiment: "the legislation at issue in that case [*D'Oench*] was undoubtedly enacted on the assumption that Federal courts applied Federal law, period. You wouldn't have to dance around *Erie* and *Claxton* and all of that stuff. But we're in a different age now. You can't --- * * * -- and I don't think Congress when it passes a statute like this assumes that there's some brooding Federal law that governs all of this stuff." *O'Melveny* Oral Arg.Tr., 1994 U.S. Trans. Lexis 155, *34 (March 21, 1994).

be inconsistent with the "significant conflict" basis of certain federal common law rules and would therefore "write *Texas* out of existence." Resp. Br. 40 n.22 (addressing Pet. Br. 24-26). But *Texas* did not involve a "conflict"-based federal common-law rule, but rather involved the rights of the United States. Denying the presumption to conflict-based federal common law would not eliminate the *Texas* decision, but would properly confine it to only those legitimate instances of federal common law involving direct federal rights rather than federal intercession into areas more properly the province of the states. Far from being unsupported by authority from this Court, that proposed limitation best harmonizes *Texas* with this Court's admonitions regarding the limits on judicial policymaking outside of the traditional federal areas. See *Milwaukee*, 451 U.S. at 317 n.9 ("the very concerns about displacing state law which counsel against finding pre-emption of state law in the absence of clear intent actually suggest a willingness to find congressional displacement of federal common law").

D. FIRREA Overcomes Even the *Texas* Presumption.

Even assuming application of the *Texas* presumption to the supposed "principles" of *D'Oench*, FIRREA (and the 1950 statute) overcomes that presumption. FIRREA's extension of the statutory rule to additional parties and claims necessarily would have limited, not enhanced, the far more sweeping *D'Oench* principle postulated by respondent. If nothing else, § 1823(e)'s "asset" requirement places a considerable restriction on the scope of the defense.[11] That requirement, and indeed, the statutory defense in its entirety, would be utterly meaningless if the sweeping common-law principle claimed by respondent continued to exist.

[11] Respondent cites with uncertain favor to the FDIC's 1997 Statement of Policy for the proposition that § 1821(d)(9)(A) does not incorporate the asset requirement of § 1823(e). Resp. Br. 42; see also U.S. Br. 26 n.11 (same). This argument was litigated and lost in the D.C. Circuit, not renewed before the Eleventh Circuit, and is not part of the Question Presented. Respondent does not even ask this Court to so construe the statute. Resp. Br. 43 n.24; U.S. Br. 26 n.11 (statutory issue not presented).

Respondent questions the comprehensiveness and specificity of FIRREA in an attempt to reduce the *inclusio unius* inference. Resp. Br. 41-42. But this Court has previously rejected such arguments about FIRREA and held that the statute comprehensively and exclusively covered the field of special federal defenses for the FDIC-Receiver. *O'Melveny*, 512 U.S. at 86-87. And as regards the *D'Oench*-related provisions themselves, FIRREA directly spoke to the types of claims covered and the entities that could invoke the defense, notably including a limited class of assignees and transferees – bridge banks. Pet. Br. 18-19 (discussing statute). FIRREA is more than comprehensive enough to trigger a strong exclusionary inference. Such an inference is sufficient to displace pre-existing common law. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Astoria*, 501 U.S. at 110.[12]

Respondent's suggestion, Resp. Br. 35-37, that *Milwaukee* requires a greater level of specificity is mistaken. As the Court noted in *Milwaukee*, the "question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S. at 324.

Interestingly, the limitations on pollution at issue in *Milwaukee* were only minimum limitations, and the scheme allowed for more stringent state regulation of pollution. But the fact that the scheme did not address pollution control beyond the minimum requirements was not sufficient to leave room

[12] Respondent's citation to *Atherton* for the proposition that when enacting FIRREA Congress "'wanted to leave other law * * * exactly where Congress found it,'" Resp. Br. 40 (quoting 519 U.S. at 231), conveniently redacts the sentence immediately following, which, referring to a specific savings clause, continuues: "That, after all, is what the statute says." 519 U.S. at 231. But there is no such savings clause applicable to the common-law *D'Oench* doctrine.

for *federal* common law above those minimum restrictions. 451 U.S. at 319-20 & n.14. The statute's failure expressly to preclude more restrictive federal limits, did not detract from its comprehensive and preemptive effect on prior federal common law. FIRREA is no different.[13]

Even apart from FIRREA, the 1950 Act spoke directly to, and hence displaced, the then-fledgling *D'Oench* doctrine. Indeed, respondent's *amici* describe the 1950 Act as having "codified the application of the *D'Oench* rule on facts parallel to the *D'Oench* case," U.S. Br. 17, and respondent himself recognizes that the 1950 Act "had the effect of making the common-law principles of *D'Oench* 'both more encompassing and more precise.' * * * The statute is narrower because it is applicable only to specific assets of an insolvent institution, but it is broader because it applies regardless of the customer's blameworthiness." Resp. Br. 11 (citation omitted); see also *id.* at 12 n.9 (quoting FDIC testimony that the 1950 legislation "'may be characterized as a codification of the law pertaining to the [FDIC]'") (citation omitted).

These descriptions amply demonstrate that the 1950 Act spoke directly to the question formerly addressed by the common-law *D'Oench* decision and in so doing fully displaced such common law even under the *Texas* standard.[14] Respondent's only answer to this is that no court has previously so held. But the failure of lower courts to consider or

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[13] The federal *amici* imply that Congress is required affirmatively to "express disapproval" before pre-existing common law will be displaced. U.S. Br. 22; see also *id.* at 4. But that has never been the test and is not required. Indeed, it would be an odd statute indeed that contained such an expression of an intent to abrogate the common law, and the Solicitor General cites to none despite the many cases in which this Court has found statutory displacement of federal common law.

[14] Respondent's recognition that after 1950 the common-law *D'Oench* "doctrine lay dormant until the late 1970s," Resp. Br. 4, seems to corroborate that for decades courts and the FDIC understood the statute to have displaced the common law.

correctly resolve an issue is hardly a reason for this Court to acquiesce in or compound that error. No court for over 60 years had held that the *Briggs* rule under consideration in *Atherton* had been overruled by *Erie*. Extended error is nonetheless error, and should be corrected.

The notion that the reenactment and expansion of § 1823(e) by FIRREA demonstrated "acceptance of the prior interpretations of the 1950 enactment," Resp. Br. 46, even if correct, would actually support petitioner given that the 1950 *statute* was interpreted narrowly as not reaching the FDIC-Receiver or assigns or affirmative claims and as being limited to "asset" cases – hence the supposed need for federal common law. Congressional acceptance of statutory interpretation does not even remotely signal acceptance of federal common law not purporting to interpret the statute.

Finally, the Solicitor General's fleeting reference to the legislative history of FIRREA is also unavailing. Nothing in that history indicates Congress intended to preserve *D'Oench* as a common-law principle, much less *D'Oench*'s frequently mutating, modern offspring. To the contrary, the legislative history does not even acknowledge the common-law doctrine, referring only to the government's *statutory* defense, a fact that supports petitioner's view that *D'Oench* was abrogated as early as 1950. *See* H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. I, at 128 (1989) ("In general the FIRRE Act provides, as the FDI Act presently provides, that no agreement can form the basis of a claim against the Corporation or the conservator or receiver unless it is in writing and properly approved and maintained in the records of the institution."); *id.* at 214 (similar). The single sentence on which Solicitor General relies, U.S. Br. 13 – that FIRREA's amendment to 12 U.S.C. § 1823 "clarifies the current provision invalidating certain secret agreements against the interests of the FDIC," H.R. Rep. No. 54, at 334 – again refers only to the statutory defense, and even if it referred to the common law doctrine would equally support petitioner's view that FIRREA represents the full ex-

tent to which Congress intended to codify "the *D'Oench* principle," U.S. Br. 2 n.1.

To the extent Congress' failure to adopt a particular statute can ever have persuasive effect, the Solicitor General's reliance on Congress' failure to enact *The D'Oench Duhme Reform Act*, S. 648, 104th Cong., 1st Sess. (1995), is particularly misplaced. It appears that any momentum for the bill was killed by the FDIC's response to it: FDIC's issuance of the policy statement providing that it would no longer assert the common law *D'Oench* doctrine as to post-FIRREA transactions. *See Hearing on S. 648 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 49 (1995) ("*S. 648 Hearing*") (prepared statement of Sharon Powers Silverstein, Asst. Gen. Couns., FDIC) (describing "the recent implementation by the FDIC of guidelines," which were issued after original introduction of bill). Moreover, the government's assertion that "the common law *D'Oench* doctrine * * * * was the impetus for the bill," U.S. Br. 15, is simply not supported by the bill's history and the Solicitor General offers no citation or explanation for that claim. Indeed, the bill would have cut back on the *statutory* defense, *see S. 648 Hearing* at 117-20, so Congress' failure to enact it hardly indicates an intent to preserve *D'Oench* as a common law doctrine.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings.

Respectfully submitted,

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